

# Adopted by House 4-11-2013

SB426 H JUD AM 4-9 #1

The Committee on the Judiciary moves to amend the bill on page two following the enacting clause, by striking out the remainder of the bill, and inserting in lieu thereof, the following language:

1 " That §46-4A-108 of the Code of West Virginia, 1931, as  
2 amended, be amended and reenacted, that §46-9-510, §46-9-516,  
3 §46-9-521 and §46-9-525 of said code, be amended and reenacted; and  
4 that said code be amended by adding thereto a new section,  
5 designated §46-9-516a, all to read as follows:

## 6 **ARTICLE 4A. FUNDS TRANSFERS.**

### 7 **§46-4A-108. Relationship to Electronic Fund Transfer Act.**

8 (a) Except as provided in subsection (b), this ~~This~~ article  
9 does not apply to a funds transfer any part of which is governed by  
10 the Electronic Fund Transfer Act of 1978 (Title XX, Public Law 95-  
11 630, 92 Stat. 3728, 15 U.S.C. §1693 et seq.) as amended from time  
12 to time.

13 (b) This article applies to a funds transfer that is a  
14 remittance transfer as defined in the Electronic Fund Transfer Act  
15 (15 U.S.C. §1693o-1) as amended from time to time, unless the  
16 remittance transfer is an electronic fund transfer as defined in  
17 the Electronic Fund Transfer Act(15 U.S.C. §1693a) as amended from  
18 time to time.

1        (c) In a funds transfer to which this Article applies, in the  
2 event of an inconsistency between an applicable provision of this  
3 article and an applicable provision of the Electronic Fund Transfer  
4 Act, the provision of the Electronic Fund Transfer Act governs to  
5 the extent of the inconsistency.

6 **ARTICLE 9.    SECURED TRANSACTIONS; SALES OF ACCOUNTS AND CHATTEL**  
7 **PAPER.**

8 **§46-9-510.    Effectiveness of filed record.**

9        (a) *Filed record effective if authorized.* - A filed record is  
10 effective only to the extent that it was filed by a person that may  
11 file it under ~~section 9-509.~~ section five hundred nine of this  
12 article.

13        (b) *Authorization by one secured party of record.* - A record  
14 authorized by one secured party of record does not affect the  
15 financing statement with respect to another secured party of  
16 record.

17        (c) *Continuation statement not timely filed.* - A continuation  
18 statement that is not filed within the six-month period prescribed  
19 by ~~section 9-515(d)~~ subsection (d), section five hundred fifteen of  
20 this article is ineffective.

21        (d) A filed record ceases to be effective if the filing office  
22 terminates the record pursuant to section five hundred sixteen-a of  
23 this article.

1 **§46-9-516. What constitutes filing; effectiveness of filing.**

2 (a) *What constitutes filing.* - Except as otherwise provided in  
3 subsection (b) of this section, communication of a record to a  
4 filing office and tender of the filing fee or acceptance of the  
5 record by the filing office constitutes filing.

6 (b) *Refusal to accept record; filing does not occur.* - Filing  
7 does not occur with respect to a record that a filing office  
8 refuses to accept because:

9 (1) The record is not communicated by a method or medium of  
10 communication authorized by the filing office;

11 (2) An amount equal to or greater than the applicable filing  
12 fee is not tendered;

13 (3) The filing office is unable to index the record because:

14 (A) In the case of an initial financing statement, the record  
15 does not provide a name for the debtor;

16 (B) In the case of an amendment or information statement, the  
17 record:

18 (i) Does not identify the initial financing statement as  
19 required by ~~9-512 or 9-518~~, section five hundred twelve or section  
20 five hundred eighteen of this article, as applicable; ~~or~~

21 (ii) Identifies an initial financing statement whose  
22 effectiveness has lapsed under section ~~9-515~~, five hundred fifteen  
23 of this article; or

24 (iii) Identifies an initial financing statement which was

1 terminated pursuant to section five hundred sixteen-a of this  
2 article;

3 (C) In the case of an initial financing statement that  
4 provides the name of a debtor identified as an individual or an  
5 amendment that provides a name of a debtor identified as an  
6 individual which was not previously provided in the financing  
7 statement to which the record relates, the record does not identify  
8 the debtor's surname; ~~or~~

9 (D) In the case of a record filed or recorded in the filing  
10 office described in ~~section 9-501(a)(1),~~ subdivision (1),  
11 subsection (a), section five hundred one of this article, the  
12 record does not provide a sufficient description of the real  
13 property to which it relates; or

14 (E) In the case of a record submitted to the filing office  
15 described in subdivision (1), subsection (a), section five hundred  
16 one of this article, the filing office has reason to believe, from  
17 information contained in the record or from the person that  
18 communicated the record to the office, that:

19 (i) If the record indicates that the debtor is a transmitting  
20 utility, the debtor does not meet the definition of a transmitting  
21 utility as described in subdivision (81), subsection (a), section  
22 one hundred two of this article;

23 (ii) If the record indicates that the transaction relating to  
24 the record is a manufactured home transaction, the transaction does

1 not meet the definition of a manufactured home transaction as  
2 described in subdivision (54), subsection (a), section one hundred  
3 two of this article; or

4 (iii) If the record indicates that the transaction relating to  
5 the record is a public finance transaction, the transaction does  
6 not meet the definition of a public finance transaction as  
7 described in subdivision (70), subsection (a), section one hundred  
8 two of this article;

9 (4) In the case of an initial financing statement or an  
10 amendment, if the filing office believes in good faith that the  
11 record was communicated to the filing office in violation of  
12 section five hundred sixteen-a of this article;

13 ~~(4)~~ (5) In the case of an initial financing statement or an  
14 amendment that adds a secured party of record, the record does not  
15 provide a name and mailing address for the secured party of record;

16 ~~(5)~~ (6) In the case of an initial financing statement or an  
17 amendment that provides a name of a debtor which was not previously  
18 provided in the financing statement to which the amendment relates,  
19 the record does not:

20 (A) Provide a mailing address for the debtor;

21 (B) Indicate whether the name provided as the name of the  
22 debtor is the name of an individual or an organization;

23 ~~(6)~~ (7) In the case of an assignment reflected in an initial  
24 financing statement under ~~section 9-514(a)~~ subsection (a), section

1 five hundred fourteen of this article or an amendment filed under  
2 ~~section 9-514(b)~~, subsection (b), section five hundred fourteen of  
3 this article, the record does not provide a name and mailing  
4 address for the assignee; or

5 ~~(7)~~ (8) In the case of a continuation statement, the record is  
6 not filed within the six-month period prescribed by ~~section~~  
7 ~~9-515(d)~~. subsection (d), section five hundred fifteen of this  
8 article.

9 (c) *Rules applicable to subsection (b).* - For purposes of  
10 subsection (b):

11 (1) A record does not provide information if the filing office  
12 is unable to read or decipher the information; and

13 (2) A record that does not indicate that it is an amendment or  
14 identify an initial financing statement to which it relates, as  
15 required by ~~section 9-512, 9-514 or 9-518~~, sections five hundred  
16 twelve, five hundred fourteen or five hundred eighteen of this  
17 article, is an initial financing statement.

18 (d) *Refusal to accept record; record effective as filed*  
19 *record.* - A record that is communicated to the filing office with  
20 tender of the filing fee, but which the filing office refuses to  
21 accept for a reason other than one set forth in subsection (b) of  
22 this section, is effective as a filed record except as against a  
23 purchaser of the collateral which gives value in reasonable  
24 reliance upon the absence of the record from the files.

1       ~~(e) Administrative review. -- If the Secretary of State~~  
2 ~~determines that a financing statement which identifies a public~~  
3 ~~official or employee as a debtor is fraudulent or that an~~  
4 ~~individual debtor and an individual secured party would appear to~~  
5 ~~be the same individual on the financing statement or that the~~  
6 ~~individual debtor claims to be a transmitting utility, without~~  
7 ~~supporting documents, the Secretary may commence administrative~~  
8 ~~proceedings to remove the statement from its records in accordance~~  
9 ~~with the provisions of article five, chapter twenty-nine-a of this~~  
10 ~~code.~~

11       ~~(1) Upon the commencement of proceedings pursuant to this~~  
12 ~~subsection, the Secretary of State shall identify the financing~~  
13 ~~statement in its records as subject to administrative review and~~  
14 ~~publish a notice in the West Virginia Register regarding the~~  
15 ~~proceedings.~~

16       ~~(2) A financing statement may be found to be fraudulent only~~  
17 ~~if, based upon clear and convincing evidence, no good faith basis~~  
18 ~~exists upon which to conclude that the secured party was authorized~~  
19 ~~to file the statement and the statement was submitted for the~~  
20 ~~purpose of harassment or intimidation or fraudulent intent of the~~  
21 ~~alleged debtor.~~

22       ~~(3) If upon the completion of administrative review, it is~~  
23 ~~determined that the filing of a financing statement was fraudulent,~~  
24 ~~the filing party shall be assessed all costs incurred by the~~

1 Secretary in reaching a final determination, including  
2 reimbursement for all costs of the hearing. The filing party may  
3 also be subject to a civil penalty not exceeding \$500 per  
4 fraudulent filing. If upon completion of administrative review or  
5 any subsequent appeal of a decision of the Secretary of State, it  
6 is determined that a filing subject to appeal is not fraudulent,  
7 the secretary or court may award the prevailing party reasonable  
8 costs and expenses, including attorney fees.

9       ~~(4) The Secretary of State shall annually submit a report to~~  
10 ~~the Legislature regarding actions taken against fraudulent filings~~  
11 ~~pursuant to this section which identifies the number and~~  
12 ~~characteristics of such proceedings, identifies any creditors found~~  
13 ~~to have made fraudulent filings, describes proceedings initiated by~~  
14 ~~the secretary in which it is ultimately determined that fraudulent~~  
15 ~~filings did not occur, describes the number and type of complaints~~  
16 ~~received by the secretary in which it is alleged that fraudulent~~  
17 ~~filings have occurred, and describes the actions taken by the~~  
18 ~~secretary to investigate complaints concerning allegedly fraudulent~~  
19 ~~filings and the results of the investigations.~~

20       ~~(5) A decision by the secretary to remove a financing~~  
21 ~~statement determined to have been fraudulently filed subject to~~  
22 ~~appeal de novo to the circuit court of Kanawha County. Pending the~~  
23 ~~outcome of an appeal, the financing statement may not be removed~~  
24 ~~from the records of the Secretary, but shall be identified in the~~



~~records as having been adjudicated to be fraudulent, subject to a pending appeal by the putative creditor.~~

~~(6) A financing statement filed by a regulated financial institution is not subject to the provisions of this section. For the purposes of this section, a regulated financial institution is a bank, bank and trust company, trust company, savings bank, savings association, building and loan association, credit union, consumer finance company, insurance company, investment company, mortgage lender or broker, securities broker, dealer or underwriter, or other institution chartered, licensed, registered or otherwise authorized under federal law, the law of this state or any other state, to engage in secured lending.~~

**§46-9-516a. Filing fraudulent records; civil and criminal penalties; administrative proceedings; immunity from liability.**

(a) No person may cause to be communicated to the filing office for filing a false record the person knows or reasonably should know:

(1) Is not authorized or permitted under sections five hundred nine, seven hundred eight or eight hundred eight of this article;  
and

(2) Is filed with the intent to harass or defraud the person identified as debtor in the record or any other person.

(b) Any person who violates subsection (a) of this section

1 shall, for a first offense, be guilty of a misdemeanor and, upon  
2 conviction thereof, shall be fined not less than \$100 nor more than  
3 \$1000 or, in the discretion of the court, be confined in jail not  
4 more than twelve months, or both fined and confined. Any person  
5 who violates subsection (a) of this section shall, for a second or  
6 subsequent offense, be guilty of a felony and, upon conviction  
7 thereof, shall be imprisoned in a state correctional facility not  
8 less than one nor more than five years.

9 (c) Any person who violates subsection (a) of this section is  
10 liable in a civil action to each injured person for:

11 (1) The greater of the actual damages caused by the violation  
12 or up to \$10,000 in lieu of actual damages;

13 (2) Reasonable attorney fees;

14 (3) Court costs and other related expenses of bringing an  
15 action including reasonable investigative expenses; and

16 (4) In the discretion of the court, punitive damages in an  
17 amount determined by the court or jury.

18 (d) A person identified as a debtor in a filed record the  
19 person believes was caused to be communicated to the filing office  
20 in violation of subsection (a) of this section may, under penalty  
21 of perjury, file with the Secretary of State an affidavit to that  
22 effect. The Secretary of State shall adopt and make available a  
23 form affidavit for use under this section.

24 (e) Upon receipt of an affidavit filed under this section, or

1 upon administrative action by the Secretary of State, the Secretary  
2 of State shall communicate to the secured party of record on the  
3 record to which the affidavit or administrative action relates and  
4 to the person who communicated the record to the filing office, if  
5 different and known to the office, a request for additional  
6 documentation supporting the effectiveness of the record. The  
7 Secretary of State shall review all such documentation received  
8 within thirty days after the first request for additional  
9 documentation is sent if the Secretary of State has a reasonable  
10 basis for concluding that the record was communicated to the filing  
11 office in violation of subsection (a) of this section.

12 The Secretary of State may initiate an administrative action  
13 under this subsection with regard to a filed record if the  
14 Secretary of State has reason to believe, from information  
15 contained in the record or obtained from the person who  
16 communicated the record to the filing office, that the record was  
17 communicated to the filing office in violation of subsection (a) of  
18 this section. The Secretary of State may give heightened scrutiny  
19 to a record that indicates the debtor is a transmitting utility or  
20 that indicates the transaction to which the record relates is a  
21 manufactured home transaction or a public finance transaction.

22 (f) The Secretary of State may not charge a fee to file an  
23 affidavit under this section and may not return a fee paid for  
24 filing a record terminated under this section.

1       (g) The Secretary of State shall promptly communicate to the  
2 secured party of record a notice of the termination of a record  
3 under subsection (e) of this section. A secured party of record  
4 who believes in good faith that the record was not communicated to  
5 the filing office in violation of subsection (a) of this section  
6 may file an action to require that the record be reinstated by the  
7 filing office. A person who communicated a record to the filing  
8 office that the filing office rejected in reliance on subdivision  
9 (4), subsection (b), section five hundred sixteen of this article,  
10 who believes in good faith that the record was not communicated to  
11 the filing office in violation of subdivision (4), subsection (b),  
12 section five hundred sixteen of this article, may file an action to  
13 require that the record be accepted by the filing office. The  
14 jurisdiction for the action is the circuit court of Kanawha County.

15       (h) If the court determines that a record terminated under  
16 this section or rejected in reliance on subdivision (4), subsection  
17 (b), section five hundred sixteen of this article should be  
18 reinstated or accepted, the court shall provide a copy of an order  
19 to that effect to the Secretary of State. On receipt of an order  
20 reinstating a terminated record, the Secretary of State shall  
21 refile the record along with a notice indicating that the record  
22 was refiled pursuant to this section and its initial filing date.  
23 On receipt of an order requiring that a rejected record be  
24 accepted, the Secretary of State shall promptly file the record

1 along with a notice indicating that the record was filed pursuant  
2 to this section and the date on which it was communicated for  
3 filing. A rejected record that is filed pursuant to an order of a  
4 court shall have the effect described in subsection (d), section  
5 five hundred sixteen of this article for a record the filing office  
6 refuses to accept for a reason other than one set forth in  
7 subsection (b), section five hundred sixteen of this article.

8       (i) A terminated record that is refiled under subsection (h)  
9 of this section is effective as a filed record from the initial  
10 filing date. If the period of effectiveness of a refiled record  
11 would have lapsed during the period of termination, the secured  
12 party may file a continuation statement within thirty days after  
13 the record is refiled and the continuation statement has the same  
14 effect as if it had been filed during the six-month period  
15 described in subsection (d), section five hundred fifteen of this  
16 article. A refiled record is considered never to have been  
17 ineffective against all persons and for all purposes except that it  
18 is not effective as against a purchaser of the collateral that gave  
19 value in reasonable reliance on the absence of the record from the  
20 files.

21       (j) Neither the filing office nor any of its employees incur  
22 liability for the termination or failure to accept a record for  
23 filing in the lawful performance of the duties of the office or  
24 employee.

1       (k) This section does not apply to a record communicated to  
2 the filing office by a regulated financial institution or by a  
3 representative of a regulated financial institution, except that  
4 the Secretary of State may request from the secured party of record  
5 on the record or from the person that communicated the record to  
6 the filing office, if different and known to the office, additional  
7 documentation supporting that the record was communicated to the  
8 filing office by a regulated financial institution or by a  
9 representative of a regulated financial institution. For the  
10 purposes of this section the term "regulated financial institution"  
11 means a financial institution subject to regulatory oversight or  
12 examination by a state or federal agency and includes banks,  
13 savings banks, savings associations, building and loan  
14 associations, credit unions, consumer finance companies, industrial  
15 banks, industrial loan companies, investment funds, installment  
16 sellers, mortgage servicers, sales finance companies and leasing  
17 companies.

18       (l) If a record was communicated to the filing office for  
19 filing before the effective date of this section, and its  
20 communication would have constituted a violation of subsection (a)  
21 of this section if it had occurred on or after the effective date  
22 of this section:

23       (i) Subsections (b) and (c) are not applicable; and

24       (ii) The remaining subsections of this section are applicable.

1 **§46-9-521. Written financing statement and amendment thereto.**

2 (a) *Initial financing statement.* - A filing office that  
3 accepts written records may not refuse to accept a written initial  
4 financing statement ~~in the following form and format~~ except for a  
5 reason set forth in ~~section 9-516(b):~~ subsection (b), section five  
6 hundred sixteen of this article: *Provided, That the written record*  
7 must be on the most recent revision of the appropriate form as  
8 approved by the International Association of Commercial  
9 Administrators."

10 (b) *Amended financing statement.* - A filing office that  
11 accepts written records may not refuse to accept an amended written  
12 record ~~in the following form and format~~ except for a reason set  
13 forth in ~~section 9-516(b):~~ subsection (b), section five hundred  
14 sixteen of this article: *Provided, That the written record must be*  
15 on the most recent revision of the appropriate form as approved by  
16 the International Association of Commercial Administrators.

17 **§46-9-525. Fees.**

18 (a) *Initial financing statement or other record: general*  
19 *rule.* -- Except as otherwise provided in subsection (e) of this  
20 section, the fee for filing and indexing a record under this part,  
21 other than an initial financing statement of the kind described in  
22 subsection (b) of this section, is the amount specified in  
23 subsection (c) of this section, if applicable, plus:

(1) ~~Ten~~ \$20 dollars if the record is communicated in writing and consists of one or two pages; and

(2) ~~Ten~~ \$20 dollars if the record is communicated in writing and consists of more than two pages; and

(3) ~~Ten~~ \$20 dollars if the record is communicated by another medium authorized by filing-office rule.

(b) *Initial financing statement: Public-finance and manufactured housing transactions.* -- Except as otherwise provided in subsection (e) of this section, the fee for filing and indexing an initial financing statement of the following kind is the amount specified in subsection (c) of this section, if applicable, plus:

(1) ~~Ten dollars~~ \$20 if the financing statement indicates that it is filed in connection with a public-finance transaction;

(2) ~~Ten dollars~~ \$20 if the financing statement indicates that it is filed in connection with a manufactured-home transaction.

(c) *Number of names.* -- The number of names required to be indexed does not affect the amount of the fee in subsections (a) and (b) of this section.

(d) *Response to information request.* -- The fee for responding to a request for information from the filing office, including for issuing a certificate showing whether there is on file any financing statement naming a particular debtor, is:

(1) ~~Five dollars~~ \$10 if the request is communicated in writing;



1       (2) ~~Five dollars~~ \$10 if the request is communicated by another  
2 medium authorized by filing-office rule; and

3       (3) ~~Fifty cents~~ \$1 per page for each active lien.

4       (e) *Record of mortgage.* -- This section does not require a fee  
5 with respect to a record of a mortgage which is effective as a  
6 financing statement filed as a fixture filing or as a financing  
7 statement covering as-extracted collateral or timber to be cut  
8 under section 9-502(c) of this article. However, the recording and  
9 satisfaction fees that otherwise would be applicable to the record  
10 of the mortgage apply.

11       (f) *Deposit of funds.* -- All fees and moneys collected by the  
12 Secretary of State pursuant to the provisions of this article shall  
13 be deposited by the Secretary of State as follows: One-half shall  
14 be deposited in the special revenue account created by paragraph  
15 (B), subdivision (4), subsection (c), section ten, article one,  
16 chapter fifty-nine of this code to provide civil legal services for  
17 low income persons, one-fourth shall be deposited in the state  
18 fund, general revenue, and ~~one-half~~ one-fourth shall be deposited  
19 in the service fees and collections account established by section  
20 two, article one, chapter fifty-nine of this code for the operation  
21 of the office of the Secretary of State. Any balance remaining on  
22 June 30, 2001, in the existing special revenue account entitled  
23 "uniform commercial code" as established by chapter two hundred  
24 four, acts of the Legislature, 1989 regular session, shall be

1 transferred to the service fees and collections account established  
2 by section two, article one, chapter fifty-nine of this code for  
3 the operation of the office of the Secretary of State. The  
4 Secretary of State shall dedicate sufficient resources from that  
5 fund or other funds to provide the services required in this  
6 article, unless otherwise provided by appropriation or other action  
7 by the Legislature."

The Committee on the Judiciary moves to amend the title of the  
committee substitute, as follows:

"A BILL to amend and reenact §46-4A-108 of the Code of West Virginia, 1931, as amended, to amend and reenact §46-9-510, §46-9-516, §46-9-521 and §46-9-525 of said code; and to amend said code by adding thereto a new section, designated §46-9-516a, all relating to amending the Uniform Commercial Code; clarifying the relationship between article 4A of the West Virginia code and the federal Electronic Fund Transfer Act; resolving conflicts between federal and state law; providing for the effectiveness of filed records; creating additional authority to refuse to accept a record for filing; creating circumstances under which a record filing is false; providing criminal penalties for filing or attempting to file a false record; providing civil penalties for filing or attempting to file a false record; setting forth an administrative procedure initiated by the Secretary of State or a person identified as a debtor on a record; requiring party to an adverse administrative decision by the Secretary of State to file action in Kanawha County Circuit Court if the party wishes to have the Secretary of State's decision reversed; exempting the filing office and its employees from liability; exempting filings by a regulated financial institution or its representatives from certain provisions; clarifying the applicability of provisions to records filed prior to the effective date of this article; increasing fees for filing financing statements or other records in secured

transactions; increasing fees for responding for requests for information related to secured transactions; and requiring that the increase in fees be deposited in the existing Fund for Civil Legal Services for Low Income Persons.